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Kannan a/l Letchumanan v Pendakwa Raya

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HIGH COURT (IPOH) — CIVIL APPEAL NO AA-41S-3–03 OF 2022
BHUPINDAR SINGH J
17 JULY 2024

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged for offence of driving motor vehicle with alcohol concentration above prescribed limit under s 45A(1) of Road Transport Act 1987 ('RTA') — Appellant convicted and sentenced to imprisonment, fine and suspension of driving licence — Whether s 45C(1)(a) of RTA directory or mandatory — Whether s 45C(1)(a) of RTA must be read together with s 45B(1) of RTA to prove an offence under s 45A(1) of RTA — Road Transport Act 1987 ss 45A(1), 45B(1) & 45C(1)

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From 31 December 2020 at about 11pm until 1 January 2021 at 3am, a team of police officers that consisted of PW1, PW2 and PW3 had conducted a roadblock operation. PW1 stopped the appellant's car for not switching on the front lights. According to PW1, the appellant was not acting normal as he did not answer the questions asked and smelled of alcohol. PW2 then drove the appellant to the police station for a breath test. At the police station, PW3 asked the appellant to provide a breath test using the evidential breath analyser ('EBA') to detect the alcohol level in the appellant's body. The EBA test revealed that the content of alcohol in the appellant's body was 151mg of alcohol in 100ml of blood. The amount of alcohol in the appellant's body exceeded 101mg of the prescribed limit under the Road Transport Act 1987 ('RTA'). After concluding the breath test, PW3 handed over the case to the investigation officer ('PW4') for further investigation. The appellant was charged at the magistrates court for an offence under s 45A(1) of the RTA. He was convicted for the offence and sentenced to 14 days imprisonment and fined RM10,000 in default six months imprisonment. All classes of the appellant's driving licence were also suspended for two years from the date of conviction. Hence, this appeal. The issues for consideration were: (a) whether s 45C(1)(a) of the RTA was directory or mandatory; and (b) whether s 45C(1)(a) of the RTA must be read together with s 45B(1) of the RTA to prove an offence under s 45A(1) of the RTA.

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Held, allowing the appeal:

(1) Section 45C(1) of the RTA related to a substantive procedure that must be followed by a police officer in the course of an investigation. Although s 45C(1) of the RTA used the word 'may', it related to an action where

discretion was coupled with an obligation. The investigation officer had the discretion to require a person to provide specimens according to s 45C(1)(a) or (b) of the RTA but it was absolutely essential for the investigation officer to require the specimen under s 45C(1) of the RTA. PW4 never requested any specimen from the appellant under s 45C(1)(a) or (b) of the RTA during his investigation (see paras 11–12).

(2) A breath test included a preliminary test to indicate whether the proportion of alcohol in a person's breath exceeded the prescribed limit. Section 45B(1) of the RTA provided for an initial breath test, which only indicated the amount of alcohol in a person's breath. Once the preliminary breath test was positive, then the operative words of s 45C(1) of the RTA must be obeyed during the investigation. The provision of s 45C(1) of the RTA clearly reflected that the breath test provided under s 45B(1) of the RTA was inconclusive. Although the appellant had provided a breath specimen for a breath test under s 45B(1) of the RTA, an investigation officer investigating an offence under s 45A(1) of the RTA must require the appellant to provide two specimens of breath for analysis or a specimen of blood or urine under s 45C(1) of the RTA. Section 45B(1) of the RTA could not stand independently on its own but must be read together with s 45C(1) of the RTA. Under s 45C(1) of the RTA, the procedure by which the investigation officer conducted the breath test had been prescribed by the Motor Vehicles (Breath, Blood and Urine Tests) Rules 1995 ('BBUT Rules'). A preliminary breath test required under s 45B(1) of the RTA could not be used as the foundation of a conviction for an offence under s 45A of the RTA. Therefore, s 45C(1) of the RTA must be declared as mandatory. PW4 after receiving the appellant from PW3, did not comply with the mandatory provision of s 45C(1) of the RTA, resulting in a miscarriage of justice. The preliminary test conducted by PW3 under s 45B(1) of the RTA was insufficient to prove the offence under s 45A(1) of the RTA, as the mandatory provision of s 45C(1) of the RTA was entirely disregarded (see paras 14–15, 21–22 & 28–29).

(3) The appellant was deprived of the procedural law, which required him to provide two breath specimens for analysis under s 45(1)(a) of the RTA. He was also denied the procedural safeguards made under the BBUT Rules. The appellant was not given a fair trial and had lost a fair chance of being acquitted, which was reasonably opened to him. The police officer's omission to provide procedural fairness during the investigation, according to the RTA and BBUT Rules, amounted to a miscarriage of justice. The failure to strictly observe the provision of s 45C(1) of the RTA and the BBUT Rules and adduced cogent evidence against the appellant on the prescribed limit of alcohol in the appellant's body based

on two breath specimens meant that the prosecution had failed to prove the offence against the appellant beyond a reasonable doubt (see paras 36 & 38).

[Bahasa Malaysia summary

Dari 31 Disember 2020 pada sekitar jam 11 malam hingga 1 Januari 2021 jam 3 pagi, sekumpulan pegawai polis yang terdiri daripada PW1, PW2 dan PW3 telah menjalankan operasi sekatan jalan raya. PW1 menghentikan kereta perayu kerana tidak menyalakan lampu hadapan. Menurut PW1, perayu tidak bertindak secara normal kerana tidak menjawab soalan yang ditanya dan berbau alkohol. PW2 kemudian memandu perayu ke balai polis untuk menjalani ujian nafas. Di balai polis, PW3 meminta perayu untuk memberikan ujian nafas menggunakan evidential breath analyser ('EBA') untuk mengesan tahap alkohol dalam badan perayu. Ujian EBA menunjukkan bahawa kandungan alkohol dalam badan perayu adalah 151mg alkohol dalam 100ml darah. Jumlah alkohol dalam badan perayu melebihi 101mg daripada had yang ditetapkan di bawah Akta Pengangkutan Jalan 1987 ('APJ'). Selepas menyelesaikan ujian nafas, PW3 menyerahkan kes tersebut kepada pegawai penyiasat ('PW4') untuk siasatan lanjut. Perayu didakwa di mahkamah majistret atas kesalahan di bawah s 45A(1) APJ. Dia disabitkan atas kesalahan tersebut dan dijatuhkan hukuman penjara 14 hari dan denda RM10,000, jika gagal enam bulan penjara. Semua kelas lesen memandu perayu juga digantung selama dua tahun dari tarikh sabitan. Oleh itu, rayuan ini. Isu-isu untuk pertimbangan ialah: (a) sama ada s 45C(1)(a) APJ adalah direktori atau mandatori; dan (b) sama ada s 45C(1)(a) APJ mesti dibaca bersama dengan s 45B(1) APJ untuk membuktikan kesalahan di bawah s 45A(1) APJ.

Diputuskan, membenarkan rayuan:

(1) Seksyen 45C(1) APJ berkaitan dengan prosedur substantif yang mesti diikuti oleh pegawai polis semasa penyiasatan. Walaupun s 45C(1) APJ menggunakan perkataan 'boleh', ia berkaitan dengan tindakan di mana budi bicara disertai dengan kewajipan. Pegawai penyiasat mempunyai budi bicara untuk meminta seseorang memberikan spesimen mengikut s 45C(1)(a) atau (b) APJ tetapi ia adalah penting bagi pegawai penyiasat untuk memerlukan spesimen di bawah s 45C(1) APJ. PW4 tidak pernah meminta sebarang spesimen dari perayu di bawah s 45C(1)(a) atau (b) APJ semasa penyiasatannya (lihat perenggan 11–12).

(2) Ujian nafas termasuk ujian awal yang menunjukkan sama ada kadar alkohol dalam nafas seseorang melebihi had yang ditetapkan. Seksyen 45B(1) APJ memperuntukkan ujian nafas awal, yang hanya menunjukkan jumlah alkohol dalam nafas seseorang. Apabila ujian nafas awal memberikan hasil positif, maka perkataan operatif s 45C(1) APJ mesti dipatuhi semasa penyiasatan. Peruntukan s 45C(1) APJ dengan jelas menunjukkan bahawa ujian nafas yang disediakan di bawah

s 45B(1) APJ adalah tidak konklusif. Walaupun perayu telah memberikan spesimen nafas untuk ujian nafas di bawah s 45B(1) APJ, seorang pegawai penyiasat yang menyiasat kesalahan di bawah s 45A(1) APJ mesti meminta perayu untuk memberikan dua spesimen nafas untuk analisis atau satu spesimen darah atau air kencing di bawah s 45C(1) APJ. Seksyen 45B(1) APJ tidak boleh berdiri sendiri tetapi mesti dibaca bersama dengan s 45C(1) APJ. Di bawah s 45C(1) APJ, prosedur yang mana pegawai penyiasat menjalankan ujian nafas telah ditetapkan oleh Kaedah Kenderaan Motor (Ujian Nafas, Darah dan Air Kencing) 1995 ('Kaedah'). Ujian nafas awal yang diperlukan di bawah s 45B(1) APJ tidak boleh digunakan sebagai asas sabitan untuk kesalahan di bawah s 45A APJ. Oleh itu, s 45C(1) APJ mesti diisytiharkan sebagai mandatori. PW4 selepas menerima perayu dari PW3, tidak mematuhi peruntukan mandatori s 45C(1) APJ, mengakibatkan ketidakadilan. Ujian awal yang dilakukan oleh PW3 di bawah s 45B(1) APJ adalah tidak mencukupi untuk membuktikan kesalahan di bawah s 45A(1) APJ, kerana peruntukan mandatori s 45C(1) APJ telah diabaikan sepenuhnya (lihat perenggan 14–15, 21–22 & 28–29).

(3) Perayu dinafikan hak undang-undang prosedur, yang memerlukannya untuk memberikan dua spesimen nafas untuk analisis di bawah s 45(1)(a) APJ. Dia juga dinafikan perlindungan prosedur yang dibuat di bawah Kaedah. Perayu tidak diberikan perbicaraan yang adil dan telah kehilangan peluang yang wajar untuk dibebaskan, yang sepatutnya terbuka kepadanya. Peninggalan pegawai polis untuk memberikan keadilan prosedur semasa penyiasatan, menurut APJ dan Kaedah, merupakan satu ketidakadilan. Kegagalan untuk mematuhi peruntukan s 45C(1) APJ dan Kaedah secara ketat dan mengemukakan keterangan kukuh terhadap perayu mengenai had yang ditetapkan bagi alkohol dalam badan perayu berdasarkan dua spesimen nafas bermakna pihak pendakwaan telah gagal membuktikan kesalahan terhadap perayu melampaui keraguan munasabah (lihat perenggan 36 & 38).]

Cases referred to

Aizuddin Syah Ahmad v PP [2019] 3 CLJ 318, CA (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35; [1985] CLJ Rep 122, SC (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94; [1997] 1 CLJ 636, FC (refd)

Noor Shariful Rizal bin Noor Zawawi v PP [2017] 3 MLJ 460; [2017] 4 CLJ 434, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 31A

Federal Constitution arts 5, 5(1), 8(1)

Motor Vehicles (Breath, Blood and Urine Tests) Rules 1995 First Schedule, paras 4, 5(a), (c), (e), (g)
Road Transport Act 1987 ss 45A, 45A(1), (1)(a), 45B, 45B(1), 45C, 45C(1) 45C(1)(a), (1)(b), 45D, 45E, 45F, 45G

Ranjit Singh Sandhu (Ranjit Singh Sandhu & Co) for the appellant.
Khazrin Haffiz bin Khalil (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Bhupindar Singh J:

INTRODUCTION

[1] On 4 March 2022, the appellant was convicted for an offence under s 45A(1) of the Road Transport Act 1987 ('the RTA'), in this judgment, the provisions refer to the RTA unless otherwise stated). He was sentenced to 14 days imprisonment and fined RM10,000 in default six months imprisonment. All classes of his driving licence were suspended for two years from the date of conviction. Dissatisfied with the decision, the appellant appealed against the said decision. The learned magistrate granted a stay of execution for the imprisonment sentence pending the disposal of the appeal with the bail of RM5,000.

[2] The charge against the appellant reads as follows:

> Bahawa kamu pada 01/01/2021 jam lebih kurang 01.25 hrs di Jalan Sultan Iskandar, Ipoh sebagai pemandu motokar KBM 2662 telah memandu kenderaan tersebut dimana kadar alkohol dalam darah di dalam badan kamu didapati sebanyak 151mg alkohol dalam 100ml darah, iaitu lebih 101mg daripada had yang ditetapkan iaitu 50mg/100ml dan oleh yang demikian itu, kamu telah melakukan satu kesalahan dibawah Seksyen 45A(1) Akta Pengangkutan Jalan 1987 dan boleh dihukum di bawah Akta yang sama (Pindaan 2020).

BACKGROUND FACTS

[3] From 31 December 2020 at about 11pm until 1 January 2021 at 3am, Insp. Amir Ridhwan bin Abd Aziz (PW3) with his team, comprising Cpl Hassan bin A Rahman (PW1), Cpl Mahadir bin Bakhtir (PW2), Sgt Balakrishnan, Sgt Kamal and L/Cpl Rais conducted a roadblock operation at Jalan Sultan Iskandar, Ipoh.

[4] At about 1.25am, PW1 stopped the appellant's car bearing the registration number KBM 2662 for not switching on the front lights. According to PW1, the appellant was not normal as he did not answer the questions asked and smelled of alcohol. PW3 then directed PW2 to drive the

A appellant to Chamberlain Traffic Police Station ('police station') for a breath test. Upon arriving at the police station, PW2 handed the appellant to PW3.

[5] At the police station, PW3 requested the appellant to sit beside him and explained to the appellant the offence committed by him. Subsequently, PW3 B asked the appellant to provide a breath test using the Evidential Breath Analyzer ('EBA') to detect the alcohol level in the appellant's body. The EBA test revealed that the content of alcohol in the appellant's body was 151mg of alcohol in 100ml of blood. The amount of alcohol in the appellant's body exceeded 101mg of the prescribed limit under the RTA. After concluding the C breath test, PVV3 handed over the case to the investigation officer, Inspector Jong Pit Chiao (PW4), for further investigation.

ISSUE AND FINDINGS OF THE COURT

D *Whether s 45C(1) of the RTA is directory or mandatory*

[6] The core issue in this appeal is whether s 45C(1)(a) is mandatory. Whether it must be read together with s 45B(1) to prove an offence under E s 45A(1). The prosecution argued that once a police officer complies with s 45B(1) and the amount of alcohol is above the prescribed limit, it is adequate to secure a conviction under s 45A(1). There is no necessity to follow the procedure set out in s 45C(1). The prosecution relied on the judgment of the learned magistrate, where she decided:

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> 28. Mahkamah telah meneliti isu ini dan mendapati hujah peguambela adalah tidak bermerit. Mahkamah berpandangan bahawa pertuduhan bagi kes ini adalah mudah yang mana ujian hembusan nafas yang dijalankan di dalam kes ini adalah ditadbir mengikut s 45B APJ.
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> G 45. Seperti yang telah dinyatakan di atas, Mahkamah berpandangan ujian nafas bagi pertuduhan kes ini adalah ditadbir mengikut s 45B APJ yang lebih ringkas. Dapat dilihat dengan jelas pemakaian s 45C APJ adalah panduan khas semasa siasatan, dengan kata lain ujian nafas dijalankan atas permintaan pegawai siasatan semasa siasatan kes seperti siasatan dibawah s 44 dan s 45 APJ.
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> H 49. Oleh itu, memandangkan s 45C APJ tidak terpakai maka pematuhan prosedur pengambilan ujian nafas seperti dalam Jadual Pertama Kaedah 4 KKM 1995 adalah tidak terpakai.

[7] The relevant provisions of s 45B and s 45C are produced below:

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> 45B Breath test
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> (1) Where a *police officer* in uniform *has reasonable cause to suspect* —
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> (a) that a person has committed an offence under section 44 or 45 involving intoxicating liquor or under section 45A; or

(b) *that a person was the driver of or attempted to drive or was in charge of a motor vehicle in an accident involving one or more vehicles on a road or other public place,*

he may, subject to section 45D *require that person to provide a specimen of breath for a breath test*.

(2) A person may be required under subsection (1) to provide a specimen either at or near the place where the requirement is made or, if the requirement is made under paragraph (1)(b) and the police officer making the requirement thinks fit, at a police station specified by the police officer

(3) A breath test required under subsection (1) shall be conducted by the police officer making the requirement or any other police officer. ...

45C Provision of specimen for analysis

(1) *In the course of an investigation* whether a person has committed an offence under section 44 or 45 involving intoxicating liquor or *under section 45A a police officer may*, subject to the provisions of this section and to section 45D, *require him* —

(a) *to provide two specimens of breath for analysis* by means of a prescribed breathanalyser; or

(b) to provide a specimen of blood or urine for a laboratory test,

notwithstanding that he has been required to provide a specimen of breath for a breath test under subsection 45B(1).

(2) A requirement under this section to provide a specimen of breath can only he made at a police station.

(3) A breath test under this section shall only be conducted by a police officer not below the rank of sergeant or by an officer in charge of a police station and shall only be conducted at a police station. (Emphasis added.)

[8] The words used in s 45C(1) state that 'a police officer may' and the expression 'may' is generally directory and used in the permissive sense where it is not obligatory. However, not in all cases the usage of the word 'may' confer discretion. It can be applied to create an obligation or duty and have a mandatory force, NS Bindra in *Interpretation of Statutes* (8th Ed) ('Bindra') at p 614 explains the word 'may' as follows:

It is well settled that the use of word 'may' in a statutory provision would not by itself show that the provision is directory in nature. In some cases the Legislature may use the word 'may' as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, *to interpret* the legal import of *the word 'may' the court has to consider various factors,* namely, *the object and the scheme of the Act, the context and the background* against which the words have been used, *the purpose and the advantages sought to be achieved* by the use of this word and the like. It is equally well settled that *where the word 'may' involves a discretion coupled with an obligation* or where it confers a positive benefit to a general class of subjects in a utility Act, or where the court advances a remedy and suppresses the mischief or *where giving the*

word a directory significance, would defeat the very object of the Act, the word 'may' should be interpreted to convey a mandatory force. (Emphasis added.)

[9] Craies writes 'The distinction between a strict and liberal construction has almost disappeared with regards to all classes of statutes, so that all statutes, whether penal or not, are now construed by substantially the same rules ...' (Bindra p 717). Applying the rules and factors detailed by Bindra, I will now analyse the provision of s 45C to ascertain whether this provision is directory or mandatory.

[10] *Crawford in his Statutory Construction* at p 104 says 'A statute, or one or more of its provisions, may be either mandatory or directory. While usually in order to ascertain whether a statute is mandatory or directory, one must apply the rules relating to the construction of statutes; yet it may be stated, as a general rule, that those whose provisions relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance, are directory' (Bindra p 587).

[11] In the present case, s 45C(1) relates to a substantive procedure that must be followed by a police officer in the course of an investigation. It is the duty of the police officer during an investigation to require a person to provide two specimens of breath for analysis or a specimen of blood or urine for a laboratory test. The procedure stated in s 45C(1) is not merely a matter of convenience. It is an obligation imposed by law on the investigation officer.

[12] Although s 45C(1) uses the word 'may', it relates to an action where discretion is coupled with an obligation. The investigation officer has the discretion to require a person to provide specimens according to s 45C(1)(a) or (b), but it is absolutely essential for the investigation officer to require the specimen under s 45C(1). The test result of these specimens, whether under s 45C(1)(a) or (b), is necessary to prove the offence under s 45A. In this case, PW4 never requested any specimen from the appellant under s 45C(1)(a) or (b) during his investigation.

[13] To interpret the provision of s 45C(1), the intention, object and scheme of these provisions (s 45A to s 45G) must be considered. The whole purpose and the advantages sought to be achieved should not be neglected. It is an accepted principle of interpretation that the Legislature's intention should be construed as mandatory, where the aim and object of the statute would be clearly defeated if the direction to do a thing in a particular manner is not strictly observed (see: *Bindra* p 588).

[14] Reverting to the RTA, s 45B(1) is a general provision authorising a

police officer to require a person to provide a specimen of breath for a breath test. In s 45G breath test is defined as:

> 'breath test' includes a preliminary test for the purpose of obtaining, by means of a prescribed breathanalyser, an indication whether the proportion of alcohol in a person's breath, blood or urine equals or exceeds the prescribed limit.

A breath test includes a preliminary test to indicate whether the proportion of alcohol in a person's breath exceeds the prescribed limit. No specific provision in the RTA provides for a preliminary test. However, the scheme of the provisions reveals that s 45B(1) provides for an initial breath test, which only indicates the amount of alcohol in a person's breath. Once the preliminary breath test is positive, then the operative words of s 45C(1) must be obeyed during the investigation. The investigation officer is duty-bound to comply with s 45C(1)(a) or (b). The specimens provided are for analysis or laboratory test under s 45C(1)(a) or (b), respectively, and the results are conclusive.

[15] The provision of s 45C(1) clearly reflects that the breath test provided under s 45B(1) is inconclusive. The assertive words adopted in s 45C(1), 'notwithstanding that he has been required to provide a specimen of breath for a breath test under sub-s 45B(1)', strengthen the notion that the provision of s 45C(1) is mandatory. Therefore, although the appellant has provided a breath specimen for a breath test under s 45B(1), an investigation officer investigating an offence under s 45A(1) must require the appellant to provide two specimens of breath for analysis or a specimen of blood or urine under s 45C(1). An omission to do so will surely defeat the purpose of this provision.

[16] The nexus between the purpose and object of the provisions is very important. In determining whether the provision is mandatory or directory, the consequence of holding a provision to be mandatory or directory is vital. The consequence would reveal the importance of the provision. Assuming s 45C(1) is declared as a directory provision, the result would be that the whole provision of s 45C(1)(a) is rendered meaningless and redundant. A police officer would merely rely on s 45B(1) to require a person to provide a breath specimen for a breath test, and the investigation officer can completely disregard the provision of s 45C(1)(a) or (b) during his investigation. If the investigation officer decides not to comply with s 45C(1), what is there left to be investigated for an offenco under s 45A(1). Definitely, the insertion of s 45C(1) by the Legislature that goes to the root of the matter and is essential in proving the offence under s 45A(1) cannot be overlooked or disregarded.

[17] It must be emphasised that Parliament does not legislate in vain. Section 45C(1) cannot be treated as a cosmetic provision. This provision has been legislated to serve a specific purpose, where an investigation officer is directed to perform a particular act during his investigation. In the case of *Foo Loke Ying*

& Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35; [1985] CLJ Rep 122, Eusoffe Abdoolcader SCJ said:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded.

[18] Similarly, the Federal Court in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94; [1997] 1 CLJ 636 explained that:

> There is a second and equally compelling reason for rejecting the argument It is this. The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant It must be borne in mind that:
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> > As a general rule a xourt will adopt that construction of a statute which will give some effect to all of the words which it contains, per Gibbs J in *Beckwith v R* [1976] 12 ALR 333, at p 337.

[19] Specific rules were made to set out the breath test procedure and how a police officer should conduct the breath test under s 45C(1). The Motor Vehicles (Breath, Blood and Urine Tests) Rules 1995 ('the BBUT Rules') among others provided that:

> Rule 4 Breath test
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> Where a police officer requires a person to provide specimens of breath for a breath test under section 45C *of the Act, the police officer shall conduct the breath test in accordance with the procedures as set out in the First Schedule.*
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> First Schedule
>
> Procedures in Breath Test
>
> (Rule 4)
>
> (1) The breath test shall be carried out by a police officer who has been trained and duly authorised to operate the breathanaiyser.
>
> (2) No person shall be required to undergo a breath test within twenty minutes of his taking of any type of food, drink (alcoholic or otherwise), mouthspray or any type of medication.
>
> (3) No person shall be required to undergo a breath test within five minutes of his smoking.

(4) No breath specimen may be taken from any person unless he is first informed of the requirement to provide two specimens of breath in the manner provided by the Act

(5) The police officer conducting the test shall ensure that the breathanalyser has been issued with the certificate of fitness pursuant to rule 5 of of the Motor Vehicles (Breath, Blood and Urine Tests) Rules 1995 and thereafter conduct the test in the following manner:

(a) attach a new mouthpiece to the breath tube;

(b) instruct the person to blow through the mouthpiece in one long continuous breath until his breath specimen is accepted by the breathanalyser for an analysis;

(c) note in writing the reading given by the evidential breathanalyser;

(d) repeat the procedure as in paragraph (b);

(e) note in writing the reading given by the breathanalyser and thereafter inform the person of this reading and the reading referred to in paragraph (c);

(f) sign the print-out indicating such information and details as the Chief Police Officer may determine from time to time and ensure that the said print-out is also signed by the person; and

(g) give a copy of the print-out referred to in, paragraph (f) to the person.

[20] It is crystal clear that an investigation officer must comply with the mandatory procedure provided in the BBUT Rules when requiring a person to provide specimens for analysis under s 45C(1). No specific procedure has been provided for a breath test under s 45B(1). The absence of rules governing the procedure under s 45B(1) fortifies the interpretation that the breath test under s 45B(1) is only a preliminary test. On the other hand, the making of the BBUT Rules reinforces that the investigation officer has a legal duty to procure two specimens of breath for analysis or a specimen of blood or urine for a laboratory test from a person during the investigation. Thus, such construction would harmonize the intent and purpose of the provisions of s 45B(1) and s 45C(1).

[21] Bindra at p 711 writes, 'True, penal statutes should always be very strictly construed. However, it must be remembered that no rule of construction requires that a penal statute should be unreasonably construed or construed as to defeat the obvious intention of the Legislature or construed in a manner as would lead to absurd results'. Accordingly, if s 45C(1) is not mandatory, it would, without any doubt, lead to an absurd and unreasonable interpretation of the taw. The Legislature would never have intended that a breath test conducted without any procedure under s 45B(1) be given priority over a prescribed procedure for analysis or laboratory tests under s 45C(1).

Obviously, s 45B(1) cannot stand independently on its own but must be read together with s 45C(1). Therefore, to rule s 45C(1) as directory would lead to absurd and disastrous results, where an investigation officer could have the liberty to ignore the mandatory procedural law under the RTA.

[22] Generally, an investigation officer has total freedom regarding how he wants to conduct his investigation. He may have to comply with the internal administrative guidelines imposed by the department, which may not have any legal compulsion. Nevertheless, where the law explicitly states that a certain thing must be done in a particular manner, the investigation officer has no option but to comply with that provision strictly. Under s 45C(1), the procedure by which the investigation officer conducts the breath test has been prescribed by the BBUT Rules. Logically, it must be given a mandatory force.

[23] The Court of Appeal in *Aizuddin Syah Ahmad v Public Prosecutor* [2019] 3 CLJ 318, dealt with the provision of a particular procedure enacted in s 31A of the Dangerous Drugs Act 1952 and decided that:

> [13] When an Act sets out a particular procedure, that procedure must be meticulously followed and common law cases cannot override the provision of the Act as well as the supremacy of the Constitution.
>
> [14] In the instant case, the Act specifically states how the evidence must be procured. Courts however, on many occasions have thrown out evidence when it was obtained in breach of specific provision of the Act. For example, confessions statement under s 113 of the repealed Criminal Procedure Code. (See *Janab's Key To Criminal Procedure Code* (3rd Ed) pp 431 to 448).

[24] 'According to our system of law, provisions in *criminal statutes,* meant for the protection of the accused persons, are to be considered to be imperative or mandatory, because the laws of this country protect the innocent to the greatest degree; likewise when the statutes provide for the doings of acts or the exercise of power or authority, they are generally assumed to be mandatory or peremptory, irrespective of the phraseology used though manifest intention of the Legislature may replace this assumption' (Bindra p 593).

[25] Whether the construction of a penal provision should be considered mandatory or directory would largely depend on the public interest adequately balanced with the fundamental right of a private person. The paramount consideration should be whether the accepted construction of the said provision would result in any injury or prejudice to the substantial right of the accused person. Indeed, the effect of declaring s 45C(1) as discretionary would be highly prejudicial to the accused. Such construction of the law would destroy and impair the right of an accused person to a fair and unbiased investigation. An accused person has an inherent right to an impartial investigation for the offence charged. Undoubtedly, if the obligatory nature of

s 45C(1) is denied, it would result in grave injustice. A

[26] A police officer conducting an investigation under s 45C(1) must not be allowed to carry out the investigation according to his whims and fancies by neglecting the mandatory nature of s 45C(1). The requirement of s 45C(1) was inserted in the RTA to provide a fair and transparent investigation, and promote justice. A provision of law that promotes justice and fairness must be termed as imperative. Furthermore, holding such an interpretation would make the legislation more effective by harmonising the provisions and maintaining the object and intent of the legislation. B C

[27] While researching, I perused the Road Transport (Amendment) Bill 1993, which introduced s 45A to s 45G to the RTA, and the Explanatory Statement of the Bill states:

> 14. Clause 17 seeks to introduce new sections 45A, 45B, 45C, 45D, 45E, 45F and 45G. A new offence is created in the new section 45A, that is, that of driving or attempting to drive or being in charge of a motor vehicle with alcohol concentration in the body exceeding the prescribed limit. *The new section 45B deals with preliminary breath test The new section 45C deals with the investigation of an offence under section 44, 45 or 45A*. The new section 45F deals with evidence in proceedings for an offence under section 44, 45 or 45A. (Emphasis added.) D E

[28] The object and purpose of s 45B were clearly explained in the Bill, which stated that it was intended to provide for an initial breath test. A preliminary breath test required under s 45B(1) cannot be used as the foundation of a conviction for an offence under s 45A. The Bill undoubtedly clarified that s 45C intended to deal with the investigation of an offence under s 45A. As such, the procedural provision of s 45C(1) should be termed as mandatory and not directory. Therefore, the provisions s 45B(1) and s 45C(1) must be fairly construed and faithfully applied together according to the intent of the Legislature. F G

[29] Based on the above reasons, I am of the considered view that s 45C(1) must be declared as mandatory. In this case, PW4 (the investigation officer), after receiving the appellant from PW3, did not comply with the mandatory provision of s 45C(1), resulting in a miscarriage of justice. The preliminary test conducted by PW3 under s 45B(1) was insufficient to prove the offence under s 45A(1), as the mandatory provision of s 45C(1) was entirely disregarded. H

[30] Even if I am to assume that PW3 was conducting the breath test of the appellant 'during the course of an investigation' under s 45C(1)(a) as the appellant was brought to the police station and PW3 was in the process of collecting evidence, the breath test provided by the appellant was unacceptable for the following reasons. I

[31] Firstly, PW3 in his evidence testified that:

> Saya pasang mouthpiece dan minta pemandu untuk tiup pada mouthpiece tersebut sehingga mesin keiuarkan bunyi 'beep'dan setelah nafas diterima oleh mesin, mesin akan memaparkan tanggalkan mouthpiece. Setelah ditanggalkan mouthpiece, mesin akan arah tekan 'space bar'. Selepas itu, tunggu keputusan yang akan dicetak oleh mesin tersebut.
>
> ...
>
> Bunyi beep akan 2 kali bagi 2 hembusan, dan setiap bunyi beep menandakan 1 hembusan nafas yang lengkap. Sekiranya nafas tak cukup mesin akan pamerkan sample tidak sah.
>
> Semasa ujian dijalankan, untuk OKT ini mouthpiece ditukar sebanyak 2 kali, ujian pertama gagal, sampel tidak diterima, kedua baru boleh baca. Ujian pertama gagal kerana nafas yang diberikan tidak mencukupi untuk mesin beroperasi. Selepas selesai, mesin telah keluarkan 1 resit yang menunjukkan keputusan kandungan alkohol dalam badan pemandu tersebut.

PW3 confirmed during the cross-examination that he conducted the breath test for one breath specimen, 'hanya lakukan 1 ujian hembusan'. PW3 failed to require the appellant to provide two breath specimens for analysis, which breached s 45C(1)(a).

[32] Secondly, sub-para 5(a) of the First Schedule of the BBUT Rules provides that a new mouthpiece must be attached to the breath tube before conducting the breath test. PW3 stated in his evidence that he changed the mouthpiece twice during the breath test. Nothing in the notes of evidence shows that PW3 used a new mouthpiece during the appellant's breath test. The use of available mouthpieces, whether changed twice, leaves room for possible contamination of the specimen taken for analysis. There was an apparent contravention of sub-para 5(a).

[33] Thirdly, sub-paras 5(c) and (e) of the First Schedule of the BBUT Rules stipulate that PW3 was required to note in writing the readings given by the breathanalyser and inform the appellant of the readings. PW3 contravened these procedures and did not note the readings in writing nor informed the appellant as obligated under the BBUT Rules. PW3 also omitted to give a copy of the result print-out to the appellant according to sub-para 5(g) of the First Schedule of the BBUT Rules.

[34] Fourthly, PW3 explained that 'Tiba dibalai, saya arahkan OKI duduk sebelah saya dan terangkan kesaiahan yang dilakukan. Kemudian minta OKT untuk menjalankan ujian pernafasan'. Only the offence was explained to the appellant. The procedure under para 4 of the First Schedule of the BBUT Rules was never complied with. The appellant was never informed of the requirement

to provide two breath specimens in the manner provided by the RTA. Therefore, PW3 violated the BBUT Rules and the appellant's rights as accorded by the law.

[35] I must add that PW3 and PVV4 failed to comply with the mandatory procedural requirement incorporated in s 45C(1) and r 4 of the BBUT Rules. The Court of Appeal in *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460; [2017] 4 CLJ 434 explained that failure to provide procedural fairness amounts to an infringement of arts 5 and 8 of the Federal Constitution and held that:

> [45] In the Federal Court case of *Re Tan Boon Liat @ Allen & Anor; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri & Ors and Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors and Subramaniam v. Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108; [1977] CLJU 110; [1977] 1 LNS 110, according to Lee Hun Hoe CJ (Borneo) the *expression 'in accordance with law' in* art 5(1) of our Constitution *is said to be wide enough to include procedural law.*
>
> [49] On the facts of this case, a constitutional guaranteed right of the appellant had been transgressed. Gopal Sri Ram FCJ in *Lee Kwan Woh*, said, inter alia, *that an accused person in a criminal trial is entitled to a fair trial. Any breach of his constitutional guaranteed rights entitled him to be set free.*
>
> > Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed rights to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of these rights, the accused is entitled to an acquittal.
>
> [50] The appellant was deprived of the procedural law which gives him of the right of a second test — confirmation test The magistrate and learned JC, by ruling that one bottle of the appellant's urine sample was sufficient, was contrary to the IGSO F103 and the KKM Guidelines Bilangan 6/2002. The appellant, accordingly, did not have a fair trial and arts 5(1) and 8(1) *were violated. The appellant did not get what the procedural law said he should get He had lost a chance of being acquitted which was reasonably opened to him. Thus justice has been miscarried — commonly called 'miscarriage of justice'. Justice is justice in accordance with law as enshrined in* arts 5(1) and 8(1) of the Federal Constitution. *The High Court case of Australia in Mraz v The Queen* [1955] 93 CLR 493 was referred to by Gopal Sri Ram FCJ in *Lee Kwan Woh,* where Fullagar J said at p 514 in the following terms:
>
> > ... *every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedures and evidence are strictly followed.* If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly opened to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. (Emphasis added.)

A **[36]** The appellant was deprived of the procedural law, which required him to provide two breath specimens for analysis under s 45(1)(a). He was also denied the procedural safeguards made under the BBUT Rules. The police officer blatantly and deliberately contravened s 45C(1)(a) and the BBUT Rules during the investigation, resulting in the deprivation of the fundamental rights
B guaranteed to the appellant. The appellant was not given a fair trial and had lost a fair chance of being acquitted, which was reasonably opened to him. The police officer's omission to provide procedural fairness during the investigation, according to the RTA and BBUT Rules, amounts to a miscarriage of justice.

C

[37] It is undisputed that PW3 did not ask the appellant whether he had taken any medication. The appellant during examination in chief stated 'Saya sakit darah tinggi dan makan ubat. Satu hah kalau tidak bekerja saya akan hisap rokok 1 kotak, kalau hah bekerja saya akan hisap 2 setengah kotak'. The deputy
D public prosecutor confirmed during the cross-examination of DW2 that DW2 knew the appellant was a chain smoker. The omission of the police to observe the procedures of the breath test in the First Schedule of the BBUT Rules relating to medication and smoking created a reasonable doubt in the prosecution's case.

E

[38] The failure to strictly observe the provision of s 45C(1) and the BBUT Rules and adduce cogent evidence against the appellant on the prescribed limit of alcohol in the appellant's body based on two breath specimens meant that
F the prosecution had failed to prove the offence against the appellant beyond a reasonable doubt.

CONCLUSION

G **[39]** Based on the above reasons, this court finds that the conviction against the appellant by the learned magistrate was unsafe. Thus, this appeal is allowed and the appellant's conviction is set aside.

Appeal allowed.

H

Reported by Nabilah Syahida Abdullah Salleh

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